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SUPREME COURT, U.S.

No. 82-6390

THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUCIEN JOSEPH PROVOST,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS F. CLAUSS, JR.
40 Wall Street, 24th Fl.
New York, New York 10005
(212) 943-0700

QUESTION PRESENTED FOR REVIEW

Whether the five-year statute of limitations for filing an indictment or instituting an information for a non-capital offense begins to run on the day the alleged offense is completed or on the following day.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

Plaintiff:

United States of America

Defendants:

Angelo Michael Marino

Anthony Joseph Bottiglio

Thomas Andrew Guerro

Lucien Joseph Provost

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 694 F.2d 898 and is not reproduced in the Appendix annexed hereto. No opinion was rendered by the District Court for the Eastern District of New York. Portions of the trial transcript relevant to the District Court's decision may be found in the Appendix at pp. A1-A5. The judgment of the Court of Appeals for the Second Circuit denying petition for rehearing may be found in the Appendix at A6.

GROUNDS FOR JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Second Circuit was entered on November 24, 1982. A timely petition for rehearing was denied on January 11, 1983, and this petition for certiorari was filed within 60 days of that date. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

TEXT OF STATUTE INVOLVED

United States Code, Title 28:

§ 3283 Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

In an indictment filed on December 29, 1981, Angelo Michael Marino, Anthony Joseph Bottiglio, Thomas Andrew Guerro, and petitioner Lucien Joseph Provost were charged with one count of conspiring to commit offenses against the United States in violation of 18 U.S.C. § 371, to wit: (1) receiving, concealing, and selling, etc., military-type explosive materials they had reason to believe were stolen, in violation of 18 U.S.C. § 842(h) (1976); (2) selling, without authority, military-type plastic explosives belonging to the United States, in violation of 18 U.S.C. § 641 (1976); and (3) knowingly transferring military-type plastic explosives without paying a transfer tax or filing the required written application, in violation of 26 U.S.C. §§ 5811, 5812, 5861(e) and 5871 (1976). United States v. Guerro, 694 F.2d 898, 899-900 (2d Cir. 1982).*

The indictment alleged that in furtherance of the conspiracy the defendants had committed seven specified overt acts. The latest overt acts specified were an alleged December 29, 1976 sale of twenty-five pounds of military-type plastic explosives by Marino and Bottiglio to FBI Special Agent Nicholas Cantalupo, and an alleged February 2, 1977 statement by petitioner Provost to Cantalupo indicating that the defendants had lost money on the explosives transaction because they had delivered five pounds too much. Id. at 900.

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* This statement of the case is derived from the Court of Appeals for the Second Circuit's opinion in this matter.

Defendants moved to dismiss the indictment on the ground that the prosecution was barred by the five-year period of limitationn provided in 18 U.S.C. § 3282 for non-capital federal offenses. They contended that the statement alleged to have been made on February 2, 1977, was merely a narrative of past events, and could not be construed as an overt act in furtherance of the conspiracy since the goal of the conspiracy had been achieved with the sale of the explosives on December 29, 1976. Accordingly, defendants argued that the last overt act properly alleged in the indictment occurred on December 29, 1976. On the basis of the argument that the last day of the offense is counted as the first day of the limitations period, defendants contended that the December 29, 1981 indictment was filed one day past the end of the five-year limitations period. Id. at 900.

The district court denied defendants' motion to dismiss the indictment as untimely. The court held that whether the February 2, 1977 conversation was in furtherance of the conspiracy was a question for the jury to decide. In addition, the court agreed with the government that the limitations period begins on the day after the last day of the offense. Id. at 900.

Following denial of their motions, defendants entered conditional pleas of guilty: Marino, Bottiglio, and Guerro to the conspiracy charge described above, and petitioner Provost to a misdemeanor conspiracy count charged in a superseding information against him. The plea agreement approved by the court preserved for the defendants the right to appeal the statute of limitations issues. Id. at 900-901.

On appeal, the Second Circuit affirmed the district court's denial of the defendants' motion to dismiss the indictment as untimely. The Court of Appeals agreed with the district court that the limitations period for non-capital federal offenses begins on the day after the last day of the offense rather than on the last day itself. The Court of Appeals therefore held that the indictment was timely even if the conspiracy ended on December 29, 1976. As a result, the court found it unnecessary to reach the issue of whether the February 2, 1977 statement was an additional overt act in furtherance of the conspiracy. Id. at 903.

All of the defendants except Guerro, who is incarcerated on unrelated charges, are scheduled to surrender for incarceration on March 28, 1983. Guerro, Marino and Bottiglio have been sentenced to three years' imprisonment. Petitioner Provost has been sentenced to six months' imprisonment.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THIS COURT'S MOST RECENT PRONOUNCEMENTS ON THE MANNER OF CALCULATING THE PERIOD OF LIMITATIONS FOR FEDERAL OFFENSES.

Section 3282 of Title 28 provides that, except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for a non-capital federal offense "unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

The section is silent, however, on precisely

when that five-year period begins to run.* While the parties agree that the proper unit of measure is a day, they disagree as to whether the day from which one begins to calculate the limitations period is the day of, or the day after, the offense. If the day of the offense is the starting point, an indictment filed on December 29, 1981 charging a criminal offense which ended on December 29, 1976 would be untimely. If the day after the offense is the starting point, a contrary result obtains and prosecutors are thereby afforded an extra day to file an indictment.

The Second Circuit held that the day the limitations period begins to run is the day after the offense is committed. In so doing, the court relied heavily on the general rule for calculating the period of limitations for civil statutes of limitation established in Barnet v. Willingham Loan & Trust Co., 282 U.S. 437, 439 (1931). In that case, this Court held that "by common usage" a statute, which required tax assessments to be made within four years after the return was filed, permitted an assessment to be made anytime within four years and a day after the return was filed. While whether this construction comports

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* Rule 45 of the Federal Rules of Criminal Procedure states that, in calculating time pursuant to those rules, the day of the event is excluded from the calculation. Section 3568 of Title 18 of The United States Code states that, in calculating the sentence of imprisonment of any person convicted of an offense, the sentence "shall commence to run from the date on which such person is" incarcerated. Section 3282 of Title 28 does not set forth a method of calculating when the limitations period begins to run. The straightforward question presented by this petition is which method shall be used to calculate time under Section 3282, the most expansive method exampled by Rule 45 or the narrowest method exampled by Section 3568.

with common usage is debatable,* it provides a perfectly sound manner of calculating the period of limitations for civil statutes of limitation, where no strong policy grounds exist for an alternative manner of calculation. In holding the indictments filed in this case timely, however, the Second Circuit extended this manner of calculating the period of limitations for civil statutes of limitation to criminal statutes of limitation.**

The Court recognized, however, that delaying the commencement of the period of limitations until the day after the offense is directly at odds with the language of this Court in Grunewald v. United States, 353 U.S. 391 (1951). In that case, this Court stated that an indictment for conspiracy returned on October 25, 1954 would be within the former three year period of limitations under section 3282 only if one overt act in furtherance of the conspiracy was performed after October 25, 1951. Id. at 396. The Grunewald Court repeated its methodology in its consideration of an amendment to section 3282 which extended the limitations period from three to five years for all offenses not barred as of September 1, 1954. In this regard, the Court stated that an indictment for conspiracy was not time barred as of

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* Common understanding of a year is from January 1 to December 29, not from January 1 to January 1. The latter time span is more appropriately referred to as a year and a day. See, e.g., Anonymous, Sir Gawain and The Green Knight (Brian Stone trans. Penguin Classics ed. 1974).

** As the Court of Appeals noted, several lower courts have in the past extended the Willingham manner of calculating the limitations period to criminal statutes of limitation. (See United States v. Guerro, 694 F.2d at 902 and cases cited therein.)

that date if the alleged conspiracy had been still alive after September 1, 1951. Id. at 396 n.9. These statements of this Court explicitly recognize the method of calculation forwarded by petitioner, to wit, that the limitations period for a non-capital offense commences the last day of the offense, making an indictment timely only if it is filed before the relevant anniversary of that date.

Several courts have used or referred to the Grunewald method of calculating the period of limitations for criminal statutes of limitation when judging the timeliness of an indictment. See United States v. Brasco, 516 F.2d 816, 818 (2d Cir.)(per curiam), cert. denied, 423 U.S. 860 (1975); United States v. Stein, 456 F.2d 844, 850 (2d Cir.), cert. denied, 408 U.S. 922 (1972); United States v. Sarantos, 455 F.2d 877, 882-83 (2d Cir. 1972); United States v. Borelli, 336 F.2d 376, 380, 385 (2d Cir. 1964); Ex Parte Black, 147 F. 832, 841 (E.D. Wis. 1906), aff'd, 160 F. 431 (7th Cir. 1908). None of these cases, however, presented the precise factual and legal issues presented by this petition.

The Second Circuit, on the other hand, did not adhere to this Court's method of calculating Section 3282's limitations period and proclaimed the language in Grunewald to be dicta. Furthermore, despite petitioner's efforts to demonstrate otherwise, the Court of Appeals apparently found no reason for distinguishing between civil statutes of limitation and criminal statutes of limitation for the purpose of calculating when the period of limitations should be deemed to commence.

The reason for distinguishing between the two types of statutes of limitation, however, was clearly expressed by this Court in Toussie v. United States, 397 U.S. 112, 114-15 (1969):

> In deciding when the statute of limitations begins to run in a given case several considerations guide our decision. The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. For these reasons and others, we have stated before "the principle that criminal limitation statutes are 'to be liberally interpreted in favor of repose,' United States v. Scharton, 285 U.S. 518, 522 (1932)." United States v. Habig, 390 U.S. 222, 227 (1968).*

Construing the criminal limitation statute in section 3282 in favor of repose requires that the period of limitations be deemed to commence on the day of the offense rather than the day after the offense. Thus, the Second Circuit's holding that the period of limitations under section 3282 begins to run on the day after the offense not only runs contrary to this Court's interpretation of section 3282 in Grunewald but also to the general rule of construction for criminal statutes of limitation.

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* Compare the policies underlying civil statutes of limitation which balance the defendant's right to repose with plaintiff's right to attempt to recover for his injuries: "This policy of repose, designed to protect defendants, is frequently outweighed, however, where the interests of justice require vindication of the plaintiff's rights." Burnett v. New York Central R. Co., 380 U.S. 424, 428 (1965).

2. THE MANNER OF CALCULATING THE PERIOD OF LIMITATIONS UNDER SECTION 3282 IS OF PRACTICAL IMPORTANCE BUT IS RARELY PRESENTED FOR REVIEW BY THIS COURT

Although petitioner is in no position to speak definitively on the needs of the federal prosecutors, petitioner believes that the manner of calculating the period of limitations under 28 U.S.C. § 3282 may be of great importance to those who must decide when and if to seek an indictment. To make a fully informed decision, a prosecutor may need to wait to the last possible day to benefit from information garnered by last minute investigations. Similarly, he or she may need to wait until the last day of the limitations period in order to ensure the safety of participants in an investigation. Other strategic considerations may make the last day of crucial importance to a prosecutor. Accordingly, it is important for prosecutors to be able to calculate with confidence the last day on which an indictment may be found or an information instituted. Since the method of calculating the period of limitations under 28 U.S.C. § 3282 is now unclear given the Second Circuit's ruling in this case and this Court's opinion in the Grunewald case, it is important for this Court to determine conclusively which manner of calculation should be used for that section.

The opportunities for this Court to do so, however, are few. Given the uncertainties of determining the last day of the limitations period, only a brave, foolish, or forgetful prosecutor would commence prosecution of a case on the fifth anniversary of the offense. As a result, this happens very infrequently, creating very few opportunities to speak out on the proper manner

of calculation in other than dicta. The Court is presented with a rare opportunity in this case.

THOMAS F. CLAUSS, JR.
40 Wall Street, 24th Fl.
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(212) 943-0700

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, :

Plaintiff, :

-against- : CR-81-00691

ANGELO MICHAEL MARINO, ANTHONY JOSEPH BOTTIGLIO, THOMAS ANDREW GUERRO, LUCIEN JOSEPH PROVOST, :

Defendants. :

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United States Courthouse
Brooklyn, New York

March 10, 1982
9:30 a.m.

B E F O R E :

HONORABLE JACK B. WEINSTEIN,
Chief Judge

Dennis Ford,
Court Reporter

THE COURT: I shall be happy to hear you gentlemen.

MR. CLAUSS: The Statute of Limitations, Judge.

THE COURT: I have read all of your papers.

MR. CLAUSS: There are two main issues here. One is the February 2, 1977 conversation which is an overt act in furtherance, if it is, and then the indictment is clearly timely.

If it is not, then the December 29th date becomes relevant and the computation of time --

THE COURT: It is a jury question, motion to dismiss on the grounds of application of Statute of Limitations is denied.

Next.

MR. CLAUSS: I have another motion, request production of evidence signifying the connection between defendant Provost and its conspiracy.

THE COURT: What's the connection between Provost and the conpsiracy?

MR. GROVER: The February 2nd conversation.

THE COURT: He was a party to it?

MR. GROVER: It is a statement or conversation in the form of an admission and he was

in fact, explosives, and I would ask the Court to allow us to have a hearing to determine whether or not there is any basis to believe that they had explosive potential.

THE COURT: No, I am not going to waste my time with such a hearing. You will have it during the trial. If they don't prove it is an explosive, I will dismiss.

MR. BERNE: Judge, I would like to speak to the Statute of Limitations question just briefly, if I may?

THE COURT: Yes.

MR. BERNE: I realize the Court ruled and called it a jury question, but I believe the case law which we cited is clear that essentially the statute means to run from the day of the last overt act, and the law also states that once the essential aim of the conspiracy has been completed, that marks the end of the conspiracy.

THE COURT: Well, the question is, whether the conspiracy was just to deliver explosives or to sell it, and if you are selling explosives, part of it is delivery and part is payment.

MR. BERNE: And, your Honor, payment was made, the February 2nd conversation is instigated by this informant and it is clear that the motive behind the call is to try to convince these people to get involved in other things.

It begins, he is concerned, and that's why I appended the copy to my papers. He is concerned because there has been no activity which obviously he wants and his position is, as an informant, gaining points for himself, so he makes this telephone call.

He is told right up front that there is no problem. In fact, while the other parties to the conversation aren't quite incredulous, they quickly inform him, the informant, that there is no problem and everything is fine.

Nothing else happens.

So, I think you had a fair reading that the face of that conversation shows that it is merely cumulative or repetitive or it is an opening to a conversation which really tries to start a second conspiracy.

So that --

THE COURT: Well, that's an argument you

can make. It seems to me to be arguable.

MR. BERNE: But it is a question of law; isn't it your Honor?

THE COURT: I don't believe so. I think the jury will have to interpret it in the light of all the circumstances.

In any event they did indict you on the 29th day, that's five years, exactly.

MR. BERNE: Well, I think the 28th would be five years.

THE COURT: I don't believe you are right. I think the Government is perfectly right on that, beginning the next day --

MR. CLAUSS: I disagree, your Honor.

THE COURT: Well, that's a question of law, but I think we don't even have to arrive at that, because I think it is strictly a matter of fact for the jury.

MR. BERNE: I take it, your Honor, the ruling on one severence motion applies to all severence motions that were made?

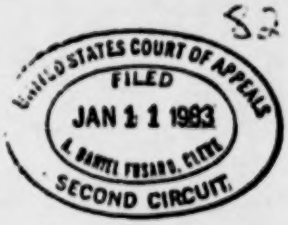
THE COURT: Correct.

MR. BERNE: Because I made that same motion and I think that perhaps -- at the same time

NITED STATES COURT OF APPEALS
ECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and or the Second Circuit, held at the United States Court House, in the ity of New York, on the eleventh day of January, one thousand ine hundred and eighty-three.

82-1103



----------X

NITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOMAS ANDREW GUERRO, ANGELO MICHAEL ARINO, LUCIEN JOSEPH PROVOST, and NTHONY JOSEPH BOTTIGLIO,

Defendants-Appellants.

----------X

No. 82-1103, 82-1131
82-1137, 82-1139

A petition for rehearing containing a suggestion that the action reheard in banc having been filed herein by counsel for the defendant-ppellant, Angelo Michael Marino,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been ransmitted to the judges of the court in regular active service and to any ther judge on the panel that heard the appeal and that no such judge has equested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by Francis X. Gindhart
Francis X. Gindhart,
Chief Deputy Clerk

NO.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

LUCIEN JOSEPH PROVOST,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CERTIFICATE OF SERVICE

I hereby certify that on March 11, 1983, one copy of the Petition for Writ of Certiorari and one copy of the Motion to Proceed in Forma Pauperis were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

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-vs-

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION TO PROCEED IN FORMA PAUPERIS

THOMAS F. CLAUSS, JR.
40 Wall Street, 24th Fl.
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Pursuant to the provisions of 28 U.S.C. § 1915, and Rule 46 of the Rules of this Court, petitioner Lucien Joseph Provost asks leave to file the attached petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit without payment of costs and to proceed in forma pauperis.

Counsel was appointed for the petitioner by the District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit under the Criminal Justice Act of 1964, as amended.

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